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2020CV007092

No. 2020AP001971 - OA

IN THE SUPREME COURT OF WISCONSIN

Donald J. Trump, Michael R. Pence,
and Donald J. Trump for President,

PETITIONERS,

V.

Anthony S. Evers, Governor, in his official capacity,
the Wisconsin Elections Commission, Ann S. Jacobs, Chair, in her official capacity, Scott McDonell, Dane County Clerk, in his official capacity, Alan A. Arnsten, Member, Dane County Board of Canvassers, in his official capacity, Joyce Waldrop, Member, Dane County Board of Canvassers, in her official capacity, George L. Christenson, Milwaukee County Clerk, in his official capacity, Timothy H. Posnanski, Member, Milwaukee Board of Canvassers, in his official capacity, Richard Bass, Member, Milwaukee County Board of Canvassers, in his official capacity and Dawn Martin, Member, Milwaukee Board of Canvassers, in her official capacity,

RESPONDENTS.

**NON-PARTY BRIEF OF THE LIBERTY JUSTICE CENTER
IN SUPPORT OF PETITIONERS**

Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
dsuhr@libertyjusticecenter.org
Counsel for Amici Curiae

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STATEMENT OF INTEREST

The Liberty Justice Center is a national public-interest law firm based in Chicago. Liberty Justice Center frequently litigates on behalf of integrity in election and campaign-finance administration. *See, e.g., Cook County Republican Party v. Pritzker*, 1:20-cv-04676 (N.D. Ill. 2020); *Cooke v. Illinois State Bd. of Elections*, 2019 IL App (4th) 180502.

STATEMENT OF THE ISSUE

Did the Wisconsin Election Commission exceed its lawful authority by issuing guidance in conflict with governing state statutes?¹

ARGUMENT

Introduction

If this brief were a ballad, it would be entitled “The Tragedy of Footnote 5.”

That is so because a single footnote in the Wisconsin Elections Commission (WEC) Recount Manual at the heart of this case illustrates a fundamental fail-

¹ Amici may introduce new issues for the Court to consider adding to the questions for review at the petition stage. *See State v. Denny*, 2017 WI 17 ¶¶ 120, 127 n.6 (Abrahamson, J., dissenting) (citing *Coyne v. Walker*, 2016 WI 38). In this respect, amici are simply adding ideas for the Court to consider in exercising its own authority to add issues. *See, e.g., Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, No. 2015AP2019 (Wis. Apr. 24, 2017) (“in addition to the issue identified in the petition for review, the parties are directed to brief an additional issue . . .”).

ure on the part of the Commission: an administrative agency baptizing an informal staff memorandum with the effect of law through a footnote in a manual instead of acting through the administrative rules process.

In its recount manual, the WEC advises municipal clerks: “Do not reject an absentee ballot if there is no separate written application.⁵” Wis. Elections Comm., “Recount Manual” (Nov. 2020), at 8.² Footnote five, at the end of that sentence, advises: “See Informal Opinion of Staff Attorney Re: Recount of the Town of Walworth Recall Election (11/18/02); but see also Wis. Stat. § 6.84(2); *Walter v. Lee v. David Paulson*, 2001 WI App 19.” *Id.*

A recent Law360 news headline suggested that if one was “Looking For Judicial Activists?” the best place to start would be to “Check The Footnotes.”³ Footnote five proves the wisdom of that observation. Alarm bells should go off in the reader’s head whenever a legal document says, “See Informal Opinion of [Unnamed] Staff Attorney. But see also a statute and a published appellate opinion.” That is all the more true, but also all easier to do, when it is done in a manual that has the effect of law without the form of law.

This cavalier attitude toward text and precedent is sadly typical of the WEC’s approach, as indicated in President Trump’s memorandum in support

² Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf>.

³ Available at <https://www.law360.com/retail/articles/1329921/looking-for-judicial-activists-check-the-footnotes>.

of his petition for an original action. This brief makes a separate, supplemental point: all of the WEC manuals, memoranda, and “dear colleague” letters are guidance documents issued in violation of Wisconsin’s administrative procedures act, and this failure to adopt them appropriately undermines their values as interpretive guides to this Court.

I. The WEC consistently issues manuals and memoranda that provide instruction to county and municipal clerks.

The WEC pumps out volumes of manuals and memoranda on a regular basis, much of which is relevant to this case. For instance, the WEC instructions regarding in-person absentee balloting, made in its Election Administration Manual, provides regarding in-person absentee voters: “The applicant does not need to fill out a separate written request if they only wish to vote absentee for the current election. The absentee certificate envelope doubles as an absentee request and certification when completed in person in the clerk’s office.”⁴

Numerous WEC documents concern the witness-address requirement. The WEC Election Administration Manual separately provides: “Clerks may add a missing witness address [to an absentee ballot envelope] using whatever

⁴ Election Administration Manual for Wisconsin Municipal Clerks, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>, pg. 91.

means are available.”⁵ A memorandum from Meagan Wolfe, WEC administrator, to all municipal and county clerks, dated October 19, 2020, states, “[T]he clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness).”⁶ And an October 18, 2016, memorandum from Michael Haas, WEC interim elections administrator, to all county and municipal clerks: “The WEC has determined that clerks **must** take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope. Clerks may contact voters and notify them of the address omission and the effect if the deficiency is not remedied but contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources.”⁷

⁵ Election Administration Manual for Wisconsin Municipal Clerks, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>, pg. 99.

⁶ Available online at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

⁷ Available online at https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/guidance_insufficient_witness_address_amended_10_1_38089.pdf (bold original).

For a final example, concerning indefinitely confined voters in the era of COVID-19, a March 24, 2020, website FAQ and a March 29, 2020, memorandum from WEC administrator Meagan Wolfe to all clerks stated: “There may be a need to do some review of the absentee voting rolls after this election to confirm voters who met the definition of indefinitely confined during the public health crisis would like to continue that status.”⁸

These are just examples of all the instruction issuing forth from the WEC. The Election Administration Manual is where all the real work gets done, weighing in at a door-stopping 250 pages.⁹ There’s also a separate Recount Manual, Referenda Manual, and Recall Manual, to mention only those starting with the letter “R,” of the 33 total manuals.¹⁰ Then there are the “clerk communications,” 50 of which have been issued since August 19, 2020.¹¹ All of these manuals and memoranda are instructions that should have been issued through the administrative rules process and was not. That is a serious failure by the WEC.

⁸ Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-03/Clerk%20comm%20re.%20Indefinitely%20Confined%203.29.20.pdf>.

⁹ Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Election%20Administration%20Manual%20%282020-09%29.pdf>.

¹⁰ Available at <https://elections.wi.gov/publications/manuals>.

¹¹ Available at <https://elections.wi.gov/clerks/recent-communications>.

II. The manuals and memoranda at the center of this case should have been issued as rules.

By contrast to all that flows forth from the WEC in an informal way, the Wisconsin Administrative Code chapter promulgated by the WEC is all of 16 pages long, and covers such riveting and election-deciding topics as the filing of documents with the WEC by email or facsimile. EL 6.04.¹² The brevity of the Code in contrast to the voluminousness of the manuals and memoranda shows that much of what's in the manuals and memoranda should be in rule.

This Court has had recent occasion to reiterate its longstanding principle “that a rule for purposes of ch. 227 is (1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency.” *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 22, 391 Wis. 2d 497, 515-16, 942 N.W.2d 900, 909-10 (quoting *Citizens for Sensible Zoning, Inc. v. Dep’t of Nat. Res.*, 90 Wis. 2d 804, 814, 280 N.W.2d 702, 707 (1979)); *id.* at ¶ 198 (Hagedorn, J., dissenting).

Certainly the WEC’s manuals and memoranda fit this bill. “A ‘rule’ need not be labeled as such. A rule may be implicit in a term, condition or limitation contained in a permit issued by the agency, . . . or in an application instruction

¹² Available at https://docs.legis.wisconsin.gov/code/admin_code/el.

sheet, . . . or in a ‘to-whom-it-may-concern’ letter . . .” *Consol. Papers, Inc. v. State*, 132 Wis. 2d 477, 392 N.W.2d 847 (Ct. App. 1986) (Gartzke, P.J., concurring). A rule is any government promulgation meeting the five-part test of *Citizens for Sensible Zoning*, which itself is based on Wis. Stat. § 227.01(13). And these WEC materials should be rules.

(1) They are statements of policy by the state’s primary election authority. See Wis. Stat. § 5.05(1) (“The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns . . .”).

(2) They are sent out to all municipal and county clerks responsible for election administration to govern this election and future elections, so they are general in application. See *Josam Mfg. Co. v. State Bd. of Health*, 26 Wis. 2d 587, 595, 133 N.W.2d 301, 306 (1965); *Frankenthal v. Wis. Real Estate Brokers’ Bd.*, 3 Wis. 2d 249, 257b, 89 N.W.2d 825, 826 (1958).

(3) The WEC and the clerks treat them as definitive statements of legal authority. The Election Administration Manual uses the phrase “clerk shall” 43 times, ordering county and municipal clerks to undertake a variety of activities. Similarly, the Haas memorandum told the clerks, using bold, that they “**must** take corrective actions in an attempt to remedy a witness address error.”

“[P]rovisions using express mandatory language are more than informational. In those provisions, the agency speaks with an official voice intended to have the effect of law.” *Cholvin v. Wis. Dep’t of Health & Family Servs.*, 2008 WI App 127, ¶29, 313 Wis. 2d 749, 763, 758 N.W.2d 118, 125 (quoting *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744 (Ct. App. 1992)). Clerks are also aware that WEC has been charged by statute to provide them with “regular information and training meetings . . . to explain the election laws and the forms and rules of the commission, to promote uniform procedures and to assure that clerks and other officials are made aware of the integrity and importance of the vote of each citizen.” Wis. Stat. § 5.05(7). This statute further reinforces clerks’ perception that WEC “information and training” is binding on their actions. WEC also carries a hammer on the back end: if a clerk or any person violates its interpretation of the laws it administers, it may investigate, prosecute, and penalize anyone who violates the election laws it is charged to administer. *Id.* at (2m).¹³

(4) The WEC is a state agency.

¹³ Though criminal or civil penalties are not necessary for a rule to have “the effect of law.” *Froedtert Mem’l Lutheran Hosp., Inc. v. Wis. Dep’t of Health & Soc. Servs.*, 110 Wis. 2d 741, 330 N.W.2d 247 (Ct. App. 1982).

(5) The WEC's manuals and memoranda interpret (often incorrectly) Wisconsin's elections statutes, which the WEC is charged with administering.

In sum, the WEC's manuals and memoranda are rules, and the WEC's failure to promulgate these statements of policy as rules undermines important constitutional principles like the separation-of-powers and public accountability.

III. WEC's avoidance of the rule-making process undermines core democratic values.

Rules, rightly promulgated, “are published in official registers. They require public hearings, written input, and a series of complicated bureaucratic checks before being implemented.” *Palm*, 2020 WI 42, ¶ 217 (Hagedorn, J., dissenting). These opportunities for public review, through notice and comment, and legislative review, through the Joint Committee on Review of Administrative Rules (JCRAR), are essential “checks and balances” to make sure an agency is following the law and staying in its lane. In many cases, these memoranda are staff documents which may not even receive review by the Commissioners of the WEC themselves, little less the public and legislature.

Administrative law in Wisconsin underwent a sea-change from 2011 to 2018. Governor Scott Walker, the Legislature, and this Court all took huge steps forward to reign in an administrative state that had exceeded its appropriate boundaries. See Kirsten Koschnick, *Making “explicit authority” explicit:*

deciphering Wis. Act. 21's prescriptions for agency rulemaking authority, 2019 Wis. L. Rev. 993, 996.

Each of these actions reflected a shared commitment across our state government to three basic principles for a good administrative procedure regime: transparency, accountability, and public input. These principles are the cornerstones of Wisconsin's administrative procedure. And they are all undermined by the WEC's practice of governing by manual and memorandum. The Petitioners are raising important questions that go to the heart of proper administrative procedure, which itself reflects fundamental principles at the heart of our republican form of government.

The first of these principles is transparency. The administrative rule-making provides clear rules for the regulated community. Though the WEC's manuals are available on its website, this does not provide notice-and-comment review. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019) (binding interpretations may "appear only in a legal brief, press release, or guidance document issued without affording the public advance notice or a chance to comment."). These WEC manuals and memoranda emerge from a black box without any transparency as to the process by which they were developed or what special interests or voices were consulted or included. Instead, law was made in secret, out-

side public view. We have no idea what legislators were consulted, what lobbyists weighed in, who approved or who objected. There is no record of reasons, data, or analysis, just the sheer exercise of will.

The second principle the WEC's practice undermines is accountability. No one ever voted for a bureaucrat. The rule-making process insists on two levels of accountability: executive and legislative. Both are essential to democratic development of the law.

Legislative accountability, exercised in this case through the Joint Committee for the Review of Administrative Rules (JCRAR), ensures oversight by the branch that originates the delegated power to write rules. *Martinez v. DILHR*, 165 Wis. 2d 687, 701 (1992). This legislative check ensures we are not governed by laws that lack the support of lawmakers. Otherwise, law is made without popular consent. Christopher DeMuth & Douglas Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075, 1081 (1986).

The strictures of Chapter 227 also ensure agencies are accountable to the governor who heads the executive branch. Wis. Const. Art. V, Sec. 1. Otherwise agencies may issue binding interpretations that are given the force of law without the knowledge or approval of the governor. See Lucas Vebber & Daniel Suhr, "Coronavirus 'guidelines' breaking the law," Empower Wisconsin (April

16, 2020)¹⁴ (Board of Aging & Long-term Care issues a memorandum which bars window visits to elderly relatives without gubernatorial approval). *See* DeMuth & Ginsburg, 99 Harv. L. Rev. at 1083; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1242 (1994).

Finally, the rules process ensures agencies will receive public input, enabling them to craft a better rule than they otherwise could. “[T]he primary purpose of Congress in imposing notice and comment requirements for rulemaking [is] to get public input so as to get the wisest rules.” *Dismas Charities, Inc. v. United States DOJ*, 401 F.3d 666, 680 (6th Cir. 2005).

In addition to increasing the quality of rules, the required public participation helps “ensure fair treatment for persons to be affected by” regulation. *Id.* at 678. This “chance to participate” by affected interests (such as campaigns and political parties in this instance) is “one of the central purposes” of the notice-and-comment requirement. *Id.*

These principles, when embodied in Wisconsin’s administrative rulemaking statute (Ch. 227), are inconvenient for bureaucrats. So from time immemorial, bureaucrats have engaged in “rule avoidance” so their schemes are not reviewable by politically accountable actors like the elected executive and legislators.

¹⁴ Available at <https://empowerwisconsin.org/coronavirus-guidelines-breaking-the-law/>.

Scholars of administrative law have documented how federal agencies use various tactics to avoid having to secure approval from the Executive Office of the President by, for instance, issuing informal documents rather than a rule. Gabriel A. Cohen, Note, *OIRA Avoidance*, 124 Harv. L. Rev. 994 (2011); Alex Acs & Charles Cameron, *Does White House Regulatory Review Produce a Chilling Effect and “OIRA Avoidance” in the Agencies?*, 43 Presidential Studies Q. 443 (2013); Nina Mendelson & Jonathan Wiener, *Executive discretion and the rule of law: responding to agency avoidance of OIRA*, 37 Harv. J.L. & Pub. Pol’y 447 (2014).

The courts of this state have avoided numerous attempts by agencies to engage in rule avoidance through the creative alternative issuance of law by other means, whether an “agency directive,” a “limitation in [a] permit,” a “manual provision,” a “guideline,” “instructions regarding renewal of licenses,” or a “letter.” *Milwaukee Area Joint Plumbing Apprenticeship Comm.*, 172 Wis. at 320-21 (collecting cases). After this case, we can add “manuals and memoranda” to that list of government documents that should have been issued as rules.

CONCLUSION

The Court should accept the petition. As it does so, the Court will doubtless be told that the Defendant County Boards of Canvassers acted in line with

WEC's instructions. Though it is no fault of the voters who in good faith followed the instructions they were, in turn, given by the Defendant clerks, the WEC's failure to act thru appropriate legal channels is glaring and should undermine the authority given to their interpretations of these statutes.

Respectfully submitted,



Daniel R. Suhr

Counsel of Record

Wis. Bar No. 1065568

LIBERTY JUSTICE CENTER

190 LaSalle St., Ste. 1500

Chicago, IL 60603

(312) 263-7668

dsuhr@libertyjusticecenter.org

Counsel for Amicus Curiae

DECEMBER 1, 2020

CERTIFICATE AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,824 words in the body, as counted by Microsoft Word.

CERTIFICATE AS TO ELECTRONIC FILING

Pursuant to R. App. Pro. 809.19(12)(F), I hereby certify that I have submitted an electronic copy of this non-party brief via email to clerk@wicourts.gov. I also certify that this electronic brief is identical in content and format to the printed form of the brief filed tomorrow. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all parties.

CERTIFICATE OF SERVICE

I certify that on December 2, 2020, I will cause three copies of the foregoing non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first class postage.

CERTIFICATES SIGNED:



Daniel R. Suhr
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
dsuhr@libertyjusticecenter.org